IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Regular Second Appeal No.1686 of 1983(O&M)

Date of Decision: February 25, 2011

Smt.Jai Kaur and others

.....Appellants

v.

Mahinder Singh

.....Respondent

CORAM: HON'BLE MR.JUSTICE RAM CHAND GUPTA

Present: Mr.Rameshwar Malik, Advocate
for the appellants.

Mr.P.S.Chauhan, Advocate
for the respondent.

.....

RAM CHAND GUPTA, J.

1. Facts giving rise to the present Regular Second Appeal are as under:-

2. Dispute is regarding inheritance of estate of Neki s/o Budha son of Shobha Ram, resident of Dagroli, i.e., agricultural land as entered in the jamabandi for the year 1976-77, pertaining to village Dagroli and as detailed in paragraph no.1 of the plaint.

3. Admitted facts are that Neki died issueless as he was unmarried. Plaintiff is father's brother's son's son of Neki and Shankar-defendant no.1, since expired and now represented by his legal representatives. Neki and Shankar were the real brothers. Mahinder Singh-plaintiff has filed the present suit for possession on the basis of title on the plea that he became owner of the property in dispute left by Neki by virtue of Will dated 29.7.1978, Ex.P1, which was executed by Neki in his favour during his life-time. A Will has also been set up by defendant-Shankar in his favour dated 7.12.1978. Plaintiff has challenged the said Will being forged one. Plea has also been taken that defendant got mutation of the land in dispute sanctioned in his favour on the basis of the said forged Will and

hence he came into possession of the land in dispute after death of Neki by virtue of the said forged Will, whereas Will, Ex.P1, dated 29.7.1978, which is a registered Will, executed in favour of plaintiff Mahinder Singh by Neki is a valid Will, which was executed by him in his sound disposing mind. Neki died on 9.12.1978.

4. Shankar, predecessor-in-interest of present appellants, had filed written statement during his life-time contesting the suit filed by respondent-plaintiff denying ownership of the Neki over the suit land, in the manner, alleged in paragraph no.1 of the plaint. However, it is admitted that he is owner of 45 kanal 4 marla of land, which was not under his cultivation and rather the same used to be cultivated by Shankar, brother of Neki, to whom the land was given in family partition. Plea has been taken that Will dated 29.7.1978 is a forged and fictitious document and that the same is also not a last Will of Neki and rather he executed another Will dated 7.12.1978 in favour of Shankar cancelling his earlier Will. Plea has also been taken that Neki died a bachelor living behind him only his natural heir, whereas plaintiff is remotely related to Neki. Plea has also been taken that Neki formed a Joint Hindu Family with him and that they were governed by Hindu Law and that the land in dispute was joint Hindu Family property and hence, Neki could not execute a Will regarding the said property. In alternative, the plea has been taken that even if it is found that they are governed by Custom, Neki could not alienate the property by Will as the same was ancestral in his hands. It has been asserted that Will dated 7.12.1978 in favour of Shankar -defendant is a valid one.

5. On the pleadings of the parties, following issues were framed by learned trial Court for adjudication:-

> "1. Whether Neki deceased was the owner of the suit land? OPP
>
> 2. Whether deceased Neki executed a valid Will in favour of the plaintiff on 29.7.1978? OPP
>
> 3. Whether deceased Neki executed a valid Will dated 7.12.78 in favour of Shankar who is now represented by the defendants? OPD
>
> 4. Whether the Will dated 7.12.1978 is forged, fictitious and based on fraud and misrepresentation? OPP

5. Whether the plaintiff is in possession of the suit land? OPP

6. Whether the suit has not been properly valued for purposes of court fee and jurisdiction? If so, what is proper value? O.P.Parties

7. Whether the suit is not maintainable in the present form? OPD

8. Whether the defendants are entitled for special costs? OPD

9. Relief."

6. Parties adduced evidence in support of their respective claims before learned trial Court. Learned trial Court decided issue no.1 in favour of respondent-plaintiff by holding that Neki was owner in possession of land in dispute.

7. Issue No.2 has been decided against respondent-plaintiff on the ground that the Will set up by him is surrounded by suspicious circumstances and that Neki deceased also could not execute a valid Will regarding ancestral land, as per custom.

8. Issue nos.3 and 4 have been decided in favour of plaintiff and against the defendant by holding that defendant has failed to prove the Will dated 7.12.1978 allegedly executed in his favour by Neki.

9. Issue No.5 has been decided against the plaintiff. Issue Nos.6 to 8 have been decided in favour of plaintiff and against the defendant.

10. As a consequence of finding on issue No.2, suit of respondent-plaintiff was dismissed on 18.11.1981 by learned Sub Judge Ist Class, Charkhi Dadri, leaving the parties to bear their own cost.

11. Respondent-plaintiff filed appeal against the said judgment of learned trial Court, which was accepted by the then learned District Judge, Bhiwani, vide judgment dated 28.7.1983, by setting aside the judgment and decree passed by learned trial Court and decreed the suit filed by respondent -plaintiff for possession of the suit land, leaving the parties to bear their own cost.

12. Aggrieved against the said judgment passed by learned District Judge, Bhiwani, the present regular second appeal was filed by legal representatives of Shankar, which was admitted without framing substantial

questions of law, as required under Section 100 of the Code of Civil Procedure (hereinafter to be referred as the `Code') and decided by a Coordinate Bench of this Court vide judgment dated 26.4.2006, allowing the same, thereby setting aside the judgment passed by learned District Judge.

13. Respondent-plaintiff filed appeal before Hon'ble Apex Court against the said judgment of this Court and however, Hon'ble Apex Court set aside the judgment and decree passed by this Court and remanded the case to this Court for fresh decision, after framing of substantial questions of law. Order passed by learned Apex Court reads as under:-

> "Leave granted.
>
> In this appeal, the appellant has questioned the judgment of the Punjab & Haryana High Court, by which the Second Appeal was allowed without framing any substantial question of law, as required under Section 100 C.P.C.
>
> Having regard to the above, we dispose of the appeal and set aside the judgment and order passed by the High Court and remit the matter to the High Court for a fresh decision after framing of substantial questions of law.
>
> There will be no order as to cost."

14. I have heard learned counsel for the parties and have gone through the whole record carefully.

15. Learned counsel for the appellants have filed substantial questions of law, stated to be arising in this second appeal, in terms of Section 100 of the Code, which were taken on record, and the same are as under:-

> "(i) Whether the Will alleged to have been executed by deceased Neki in favour of respondent-Mohinder Singh is a valid one or not?
>
> (ii) Whether the respondent had taken an active participation in the execution of the Will to become its beneficiary, thus, rendering the Will to be invalid?
>
> (iii) Whether the Will, was free from all suspicious circumstances?
>
> (iv) Whether the land in the hands of Neki being ancestral,

could be Willed away by Neki in favour of the plaintiff- a distant collateral, to the exclusion of his own brothers and sisters and that too without assigning any reason?

(v) Whether the lower Appellate Court has followed the mandatory requirement of law envisaged under Order 41 Rule 31 CPC while not returning its own issue wise separate findings despite being the final Court of fact.

(vi) Whether the instant one is a case of complete misreading of documentary as well as oral evidence available on record."

16. It may be mentioned here that present Regular Second Appeal has been filed in the year 1983 and the same was admitted on 5.8.1983 without framing substantial questions of law.

17. A Full Bench of this Court in the case of **Ghanpat v. Ram Devi** AIR 1978 Punjab and Haryana 137 had taken a view that in view of Section 41 of the Punjab Courts Act, the amended provisions of Section 100 of the Code, as amended in 1976, were not applicable to the second appeals filed in this Court and accordingly, no substantial question of law was framed, nor the aforesaid regular second appeals were admitted on any such substantial question of law. However, the Hon'ble Apex Court in the case of Kulwant Kaur v. Gurdial Singh Mann (dead) by LRs (2001) 4 JT SC 158 : (AIR 2001 SC 1273) has held that after amendment of Code of Civil Procedure in the year 1976, thereby amending Section 100, Section 41 of the Punjab Courts Act had become redundant and repugnant to the Central Act, i.e., Code of Civil Procedure and therefore was to be ignored and therefore, the second appeal shall only lie to this court under Section 100 of the amended Code of Civil Procedure on a substantial question of law.

18. It may be mentioned here that though question of law was not framed at the time of admission of present appeal, and however, it has been observed by Full Bench of this Court in **Dayal Sarup v. Om Parkash (since deceased) through L.Rs and others** (2010-4)160 PLR 1, that this Court can formulate question of law as contemplated under Section 100 of the Code at any point of time before hearing of the appeal, even without amending the grounds of appeal. It has also been held that it is the duty of the Court to formulate substantial question of law while hearing the appeal

under Sections 100(4) and 100(5) of the Code and question of law can be permitted to be raised at any stage of proceedings.

19. Moreover in this case specific direction was given by Hon'ble Apex Court to frame substantial questions of law, while remanding the appeal to this Court, while setting aside the judgment and decree passed by this Court.

20. Hence, in view of this legal background, and in view of specific order of Hon'ble Apex Court passed in this appeal, though the appeal was admitted without framing any substantial question of law, the matter is being considered by this Court on the substantial questions of law, stated to have arisen in this appeal, as argued by learned counsel for the appellants, and as reproduced above.

21. As already discussed above in this case, two Wills have been set up by both the parties, i.e., one by predecessor-in-interest of present appellants, i.e., Shankar, the original defendant and the another by Mahinder, the respondent-plaintiff. Onus to prove valid execution of Will by deceased Neki is upon the propounder of the Will, who is also required to dispel all the suspicious circumstances surrounding the Will.

22. The principles, which govern the proving of a Will were considered by Hon'ble Apex Court in **H.Venkatachala Iyengar v. B.N.Thimmajamma**, 1959 Supp (1) SCR 426 and in a later judgment passed by a Bench of four Hon'ble Judges of Hon'ble Apex Court in **Rani Purnima Debi and another v. Kumar Khagendra Narayan Deb and another,** (1962) AIR (SC) 567: 1962(3) SCR 195. It was observed as under:-

> "5. Before we consider the facts of this case it is well to set out the principles which govern the proving of a will. This case was considered by this Court in H.Venkatachala Iyengar v. B.N.Thimmajamma**,** 1959 Supp (1) SCR 426. It was observed in that case that the mode of proving a will did not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Indian Succession Act. The onus of proving the will was on the propounder and in the absence of suspicious circumstances surrounding the

execution of the will proof of testamentary capacity and signature of the testator as required by law was sufficient to discharge the onus. Where, however, there were suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the Court before the will could be accepted as genuine. If the caveator alleged undue influence, fraud or coercion, the onus would be on him to prove the same. Even where there were no such pleas but the circumstances gave rise to doubts, it was for the propounder to satisfy the conscience of the Court. Further, what are suspicious circumstances was also considered in this case. The alleged signature of the testator might be very shaky and doubtful and evidence in support of the propounder's case that the signature in question was the signature of the testator might not remove the doubt created by the appearance of the signature. The condition of the testator's mind might appear to be very feeble and debilitated and evidence adduced might not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will might appear to be unnatural, improbable or unfair in the light of relevant circumstances; or the will might otherwise indicate that the said dispositions might not be the result of the testator's free will and mind. In such cases, the Court would naturally expect that all legitimate suspicions should be completely removed before the document was accepted as the last will of the testator. Farther, a propounder himself might take a prominent part in the execution of the will which, conferred on him substantial benefits. If this was so it was generally treated as a suspicious circumstance attending the execution of the will and the propounder was required to remove the doubts by clear and satisfactory evidence. But even where there were suspicious circumstances and the propounder succeeded in removing them, the Court would grant probate, though the will might be unnatural and might cut off wholly or in part near relations."

23. In **Savithri and others v. Karthyayani Amma and others** 2007 (4) RCR (Civil) 749: 2008 AIR (SC) 300, it was observed by Hon'ble Apex Court that a Will like any other document is to be proved in terms of provisions of Indian Succession Act and the Indian Evidence Act, relevant paragraph of which reads as under:-

> "14. The legal requirements in terms of the said provisions are now well-settled. A Will like any other document is to be proved in terms of the provisions of the Indian Succession Act and the Indian Evidence Act. The onus of proving the Will is on the propounder. The testamentary capacity of the propounder must also be established. Execution of the Will by the testator has to be proved. At least one attesting witness is required to be examined for the purpose of proving the execution of the Will. It is required to be shown that the Will has been signed by the testator with his free will and that at the relevant time he was in sound disposing state of mind and understood the nature and effect of the disposition. It is also required to be established that he has signed the Will in the presence of two witnesses who attested his signature in his presence or in the presence of each other. Only when there exist suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the court before it can be accepted as genuine."

24. Hence, the legal requirements for proving execution of Will can be summarised as under:-

> "1. A Will like any other document is to be proved in terms of provisions of Indian Succession Act and the Indian Evidence Act;
>
> 2. Onus of proving the Will is on the propounder;
>
> 3. Testamentary capability of the propounder must also be established;
>
> 4. The execution of the Will by the testator has to be proved;
>
> 5. At least one attesting witness is required to be examined for the purpose of proving the execution of the Will;

6. It is required to be shown that the Will has been signed by the testator with his free will and that at the relevant time, he was in sound disposing state of mind and understood the nature and effect of disposition;

7. It is also required to be established that he has signed the Will in the presence of two witnesses, who attested his signatures in his presence or in the presence of each other;

8. When there exist suspicious circumstances, the onus would be on the propounder to explain the same to the satisfaction of the court before it can be expected as genuine.

9. The Court must satisfy its conscience before its genuineness is accepted by taking a rationale approach.

25. Hence, in the light of aforesaid legal proposition, this Court is to see as to whether respondent-plaintiff has been able to prove due execution of Will, Ex.P1, by deceased Neki in his favour and as to whether he has been able to dispel the suspicious circumstances surrounding the execution of a Will by deceased Neki.

26. So far as Will set up by predecessor-in-interest of present appellants Shankar is concerned, he has failed to prove the same and hence, issue nos.3 and 4 were decided by learned trial Court against him. Even hand-writing and finger print expert examined by plaintiff, i.e., PW10-Diwan K.S.Puri had deposed that the Will set up by Shankar dated 7.12.1978 does not contain thumb impression of Neki by comparing the same with admitted thumb impression of Neki on sale-deed executed by him during his life-time. No witness was also examined by Shankar in order to prove execution of the said Will in his favour by Neki. Rather the said plea was not pressed at the time of arguments before learned first appellate Court on behalf of the present appellants.

27. So far as Will, Ex.P1, allegedly executed by Neki in favour of respondent-plaintiff Mahinder Singh is concerned, in order to prove the same he has examined Kedar Nath, Deed Writer, who appeared as PW9 and deposed that Will Ex.P1 was scribed by him and that the same was thumb marked by Neki, after duly understanding its contents in the presence of witnesses. Plaintiff also examined both the attesting witnesses of the Will, namely, Chander Singh PW7 and Maha Singh PW8. Chander Singh is also

the Namberdar of the village. Both of them deposed that the Will was thumb marked by Neki in their presence, after duly understanding its contents and the same was scribed by Kedar Nath, the Deed Writer. Plaintiff also got proved the sale-deed No.1180 dated 25.2.1972, which was executed by Neki in favour of Kanhiya and others. Plaintiff got examined disputed thumb impression of Neki on the Will with his admitted thumb impression on the said sale-deed from handwriting and finger-print expert of repute, namely, Diwan K.S.Puri, Document Expert, Patiala, who appeared as PW10 and proved his report Ex.PW10/P and specifically deposed that in his opinion thumb impression on the disputed Will was identical with the thumb impression of Neki on the sale deed.

28. As already discussed above, he also compared alleged thumb impression of Neki on Will set up by Shanker and found that the same were not similar to his thumb impression on sale-deed and hence, Will set up by Shankar was found to be forged one and hence, he did not press the same at the time of arguments before learned first appellate Court.

29. Hence, sufficient evidence has been adduced by respondent-plaintiff in order to prove due execution of Will, Ex.P1, dated 29.7.1978 by Neki in his favour. The Will was also got registered before Sub Registrar by executant Neki. Certified copy of the Will as obtained from the office of Registrar has also been placed on record by respondent-plaintiff. There is recital of Sub Registrar on the certified copy to the effect that the contents were read over to Neki and he thumb marked the same after duly understanding its contents in the presence of witnesses including the Namberdar of the village. Learned trial Court did not accept the Will, Ex.P1, as having been allegedly executed by Neki, on the ground that there are some suspicious circumstances surrounding the Will.

30. Suspicious circumstances, as argued by learned counsel for the appellants before this Court and as also mentioned by learned trial Court in its judgment, can be enumerated as under:-

> "(i) Presence of propounder of the will, i.e., respondent -plaintiff at the time of execution of Will.
>
> (ii) Will was executed in favour of Mahender, who is remotely related to Neki in preference to his real brother Shankar and other near legal heirs without giving any reason

of their exclusion.

(iii) Some discrepancies in the depositions of witnesses of Will."

31. So far as the first point, i.e., presence of respondent-plaintiff at the time of execution of Will is concerned, though it has been deposed by PW7 and PW8 that Mahender was present at the time of execution of Will, however, law is well settled that mere presence of beneficiary of a Will at the time of execution is not a suspicious circumstance. It is to be seen as to whether beneficiary of the Will has taken active part in the execution of the Will or not. PW9 Kedar Nath, Deed Writer, has deposed in the cross-examination that the paper on which Will was scribed by him was brought by Neki, and he scribed the Will as per his direction and that he thumb marked the same on the Will as well as in his register in the presence of witnesses. Though he deposed that Mahender was not present at the time, however, he clarified that he could not say as to whether Mahender was present there or not, as Mahender was not known to him. PW7 Chander Singh, i.e., one of the attesting witnesses of the Will, deposed that he alongwith Maha Singh PW8 and Neki had left the village together for getting the Will executed and that when they reached the seat of Kedar Nath, Deed Writer, Mahender was already present there. He also deposed that the paper on which Will was scribed was brought by Neki. Similarly PW8 Maha Singh has also deposed that he was called by Neki and he had come to the Tehsil on his asking.

32. Hence, from this evidence, the only fact which is proved is that though Mahender was present at the time of execution of Will in his favour by Neki and however, he did not actively participate in the execution of the Will.

33. In **Harihar Prasad Sao v. Bhagwan Das and others**, AIR 1972 Patna 146, while relying upon **Gorantla Thataiah v. Thotakura Venkata Subbaiah,** AIR 1968 SC 1332, it was observed by Hon'ble Patna High Court that mere presence of propounder at the time of execution of the Will is not enough to say that he had taken prominent part in the execution of the Will.

34. Hence, in view of the peculiar facts and circumstances of the present case, as discussed above, mere presence of propounder of the Will

at the time of execution of the same in his favour cannot be said to be a suspicious circumstance.

35. So far as the second argument by learned counsel for the appellants that he has disinherited other near legal heirs without mentioning anything in the Will is concerned, the same also cannot be said to be a suspicious circumstance in this case. Even respondent-plaintiff is not a stranger. He is from the same family as that of Neki, though he is remotely related to Neki, through a common ancestor, Soma, as has been deposed by Mansha Ram PW6. He deposed that Mahender is the son of Juglal and Juglal is the son of Lalji, whereas Neki is son of Budh Ram and that Lalji and Budhram were sons of Soma. It has come in the evidence that Mahender used to serve Neki. It has also been mentioned in the Will that the property is being bequeathed in favour of Mahender by Neki on account of services rendered to him. All the witnesses of plaintiff have deposed that whenever Neki used to visit village Dagroli, he used to stay with Mahender. Moreover Neki had already sold a part of his land during his life-time and the amount was utilised for solemnizing the marriage of daughter of Shankar, as is clear from the recital in admitted sale-deed, executed by Neki, during his life time. Hence, it cannot be said that Neki had not given anything to his brother Shankar.

36. Hence, in this case mere deprivation of natural heir by testator would not in itself is a suspicious circumstance surrounding execution of the Will in favour of Mahender-respondent-plaintiff.

37. Moreover, law is well settled that idea behind execution of the Will is to interfere with the normal line of succession. Hence, mere deprivation of natural heir by testator would not in itself is a suspicious circumstance surrounding execution of a Will.

38. So far as some of the discrepancies in the depositions of various witnesses of the Will, as pointed out by learned counsel for the appellants, and as discussed by learned trial Court in its judgment are concerned, the same have been rightly discarded by learned first appellate Court as of minor in character. PW7 Chander Singh stated in his cross-examination that the Will was scribed on a printed paper and trial Court interpreted the same as stamp paper. However, the inference has been wrongly drawn by learned trial Court. The Will is on plain paper. Scribe

of the Will has specifically deposed that the Will was scribed on the paper brought by Neki. Another discrepancy pointed out is that PW8 Maha Singh has deposed that copy of jamabandi was brought by Neki at the time of execution of the Will and Deed Writer had given khasra numbers of the land from that jamabandi, whereas no khasra number has been mentioned in the Will. However, the witness is an illiterate one and even jamabandi was brought by Neki and was given to Deed Writer and he, in his wisdom, had not mentioned khasra number in the Will, it cannot be said that no reliance can be placed on the testimonies of Deed Writer and the witnesses of the Will. Moreover, it was not necessary to describe the property by khasra numbers in the Will.

39. It may be mentioned here that Will Ex.P1 is a registered document containing certificate of Registrar that the Will was read over to Neki and that he thumb marked the same after duly understanding its contents in the presence of witnesses.

40. Though in this case one of the attesting witnesses of the Will is Namberdar of the Village and he is an independent witness and the other being related to propounder of the Will and however, their depositions cannot be doubted in view of the fact that Will is a registered one. Though Will is not required to be registered as per law and however the registration of the Will would go a long way to prove its authenticity. On this point reliance has been placed upon **Rabindra Nath Mukherjee v. Panchanan Banerjee (dead) by Lrs**, 1995(3) PLR 594 wherein it has been observed that in case where a Will is a registered and the Sub Registrar certified that the same has been read over to the executant and admitted by him, even the fact that the witnesses to the document are interested loses significance.

41. Learned first appellate Court has discussed judgment rendered by learned trial Court thoroughly and then came to the conclusion that the grounds, on which Will was not acceptable by learned trial Court, were not sufficient to discard the same. Hence, I am of the view that there is no force in the arguments of learned counsel for the appellants that respondent-plaintiff has failed to prove the valid execution of the Will in his favour by deceased Neki.

42. The other point argued by learned counsel for the appellants is that land in dispute was ancestral in the hands of Neki as the same was

inherited by him from his father. It is further contended that Neki was governed by the custom in the matter of alienation of ancestral property and that as per custom he could not execute the Will in favour of third person of ancestral property excluding natural heirs. On this point he has placed reliance upon **Mahipat and others v. Bhim Singh and others,** 1979 PLR 589**.**

43. So far as legal proposition held in the aforesaid judgment is concerned, there is no dispute. However, it has been rightly argued by learned counsel for the respondent-plaintiff that in this case, as per case of predecessor-in-interest of appellants Shankar in the written statement and even as per case of present appellants in the written statement filed by them after the death of Shankar, plea has been taken that Neki was governed by Hindu Law and that land in dispute was joint Hindu property and that he constituted joint Hindu family with his brother Shankar and hence, he could not execute a Will in favour of a third person excluding natural heir, i.e., his brother Shankar. Custom has been pleaded by the appellants in the written statement in alternative. Hence, when main plea taken by Shankar in the present appeal is that property in hand of Neki was a joint Hindu property and that he was governed by Hindu Law, there is no substance in the plea taken by learned counsel for the appellants that Neki was governed by custom. Hence, the plea was rightly rejected by learned first appellate Court.

44. There is no dispute that land in the hands of Neki was ancestral land as the same was inherited by him from his father as the said fact has been proved by oral as well as documentary evidence placed on record on behalf of the appellants-defendants.

45. However, when as per admission of appellants, Neki was governed by Hindu law, this court is to see as to whether he could execute a Will of property inherited by him from his father.

46. Admittedly, Neki was bachelor and he died issueless. As per Article 223 of principles of Hindu Law by Mulla 15th edition, the property inherited by a male Hindu from his father, father's father, father's father's father, is ancestral property. The essential feature of ancestral property according to the Mitakshra rule is that the sons, grand sons, great grand sons of the person who inherit it, acquire an interest in it by birth. In case a

person has no son, son's son or son's son's son in existence at the time when he inherits the property, he hold the property as absolute owner thereof, and he can deal with it as he pleases. On this point reliance is placed upon **Kaila Devi and another v. Rajbir Singh and others**, 1996(1) HLR 274, relevant paragraph of which reads as under:

> "9. In was next contended by the learned counsel for the appellant that it being a coparcenary property could not be willed away. There is no such averment in the written statement to this effect. Sole reliance is being placed on one paragraph of the plaint wherein it has been stated that the property has come from their father. As per Article 223 of principles of Hindu Law by Mulla, Fifteenth Edition, the property inherited by a male Hindu from his father, father's father or father's father's father, is ancestral property. The essential feature of ancestral property according to the Mitakshara law is that the sons, grandsons and great-grandsons of the person who inherit it, acquire an interest in it by birth. In case a person has no son, son's son or son's son's son in existence at the time when he inherits the property, he hold the property as absolute owner thereof, and he can deal with it as he pleases. Admittedly, Balwant Singh did not leave behind any male issue so he is rightly held to be its absolute owner. This being so, there was no impediment in his right to deal with the property in a manner he deems fit. Thus, Balwant Singh could execute a Will in respect of such a property."

47. Admittedly, Neki did not leave behind any male issue. So he can be held to be its absolute owner. That being the position, there was no impediment in his right to deal with the said property in a manner, he deemed fit. Hence, he could execute a Will in respect of such property.

48. There is no force in the argument of learned counsel for the appellants that he could not bequeath the ancestral property by way of Will. Learned first appellate Court has also rightly discarded the said plea of present appellants as law is well settled that plea which is beyond pleadings cannot be entertained.

49. Moreover, even Shankar, predecessor-in-interest of present appellants also set up a Will, being last Will of Neki, though he could not prove the same. Hence, Shankar cannot be permitted to blow hot and cold in the same breath. When he also set up a Will executed in his favour by Neki, excluding other heirs, on the basis of which mutation of the land in dispute was also sanctioned in his favour, he cannot be permitted to take the plea that Neki was having no right to bequeath the property in dispute which was ancestral in his hand by way of Will.

50 Hence, taking from any angle, it cannot be said that Will, Ex.P1, duly proved to be executed by Neki in favour of respondent-plaintiff is not a valid Will of Neki.

51. Hence, all the aforementioned substantial questions of law on which present appeal has been argued by learned counsel for the appellants are decided against appellants and in favour of respondent-plaintiff.

52. As a sequel to my above discussion, there is no merit in the present regular Second Appeal. The same is, hereby, dismissed.

53. However, in view of the peculiar facts and circumstances of the case, the parties are left to bear their own cost.

25.2.2011 **(Ram Chand Gupta)**
meenu **Judge**

Note: Whether to be referred to Reporter? Yes/No.